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No. 78

In the Supreme Court of the United States

OCTOBER TERM, 1930

MARSHALL L. MOTT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
I. The distribution of a large portion of Jackson Barnett's bonds to his alleged wife, followed immediately by the delivery of part thereof to the petitioner, was not for Barnett's benefit within the meaning of the act of May 27, 1908. Such distribution was therefore invalid and did not transfer Barnett's right or title to the bonds	10
II. The purported gift of Barnett's bonds to his alleged wife was invalid because of his lack of mental capacity to make a gift. The approval of the transaction by the Secretary of the Interior did not make the gift valid	20
III. Since the petitioner received the bonds with notice of the facts alleged in the complaint and the mental incompetency of Barnett, he acquired no title or right thereto	33
Conclusion	34
Appendix	35

CITATIONS

Cases:	
Barnett v. *Barnett*, 121 Okla. 142; 122 Okla. 160; 122 Okla. 169	4
Barnett v. *Equitable Trust Co.*, 21 F. (2d) 825	26
Binney v. *R. I. Hospital Trust Company*, 43 R. I. 222	22
Choate v. *Trapp*, 224 U. S. 665	12
Conners v. *Murphy*, 109 N. J. Eq. 280	20
Crosbie v. *Brewer*, 68 Okla. 16	23
Decatur v. *Paulding*, 14 Pet. 497	18
Flagler, Matter of, 248 N. Y. 415	31
Garfield v. *Goldsby*, 211 U. S. 249	18, 19
Gibson v. *Collins*, 4 F. (2d) 874, certiorari denied, 267 U. S. 605	20, 27–28

Cases—Continued. Page

Hampton v. *Ewert*, 22 F. (2d) 81, certiorari denied, 276 U. S. 623 23
Heckman v. *United States*, 224 U. S. 413 13
Hemmer v. *United States*, 204 Fed. 898 18
Holmes v. *United States*, 33 F. (2d) 688 23
Jennings v. *Wood*, 192 Fed. 507 ..... 23, 28
Lane v. *Hoglund*, 244 U. S. 174 18
Le Bourgeois, In re, 144 La. 501 31
Midland Oil Co. v. *Turner*, 179 Fed. 74 23
Moore v. *Smith*, 182 Fed. 540, certiorari denied, 219 U. S. 587 31
Parker v. *Richard*, 250 U. S. 235 10
Polt v. *Polt*, 205 Pa. 189 20
Santa Fe Pacific R. R. Co. v. *Fall*, 259 U. S. 197 18
Sawyer v. *White*, 122 Fed. 223 20
Schrimpscher v. *Stockton*, 183 U. S. 290 12
Snavely v. *Henderson*, 204 Fed. 978 20
Sunderland v. *United States*, 266 U. S. 226 ..... 10, 14, 24–25
United States v. *Brown*, 8 F. (2d) 564, certiorari denied, 270 U. S. 644 10
United States v. *Brown*, 15 F. (2d) 565 ..... 23, 29
United States v. *Hinkle*, 261 Fed. 518 10
United States v. *Paine Lumber Co.*, 206 U. S. 467 12
Work v. *Louisiana*, 269 U. S. 250 18

Statutes:

United States Statutes—
Act of March 3, 1893, c. 209, 27 Stat. 612, 645 11
Act of April 26, 1906, c. 1876, Sec. 19, 34 Stat. 137, 144 12
Act of May 27, 1908, c. 199, 35 Stat. 312, 313—
Sec. 1 ..... 2, 10, 12, 35
Sec. 2 35
Sec. 5 35
Act of May 10, 1928, c. 517, 45 Stat. 495 36

Treaties:

Original Creek agreement, approved March 1, 1901, c. 676, 31 Stat. 861, 883 12
Supplemental Creek agreement, approved June 30, 1902, c. 1323, 32 Stat. 500, 506 12

Regulations:

Section 24, Interior Department regulations governing leasing, removal of restrictions, etc., on lands of members of the Five Civilized Tribes, issued March 8, 1921 36–38
Amendment to section 24 of the regulations of March 8, 1921, issued October 7, 1922 38

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Oklahoma (R. 60) is reported in 33 F. (2d) 340. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 71) is reported in 37 F. (2d) 860.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 3, 1930. (R. 76.) Certiorari was granted May 19, 1930. Jurisdiction is conferred upon this Court by Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior is empowered to dispose of restricted trust funds of a full-blood adult Creek Indian by approving a gift thereof to third persons, in view of the provisions of Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, which prohibits any such disposition unless the same is for the benefit of the Indian owner.

2. Whether the Secretary of the Interior is empowered to dispose of restricted trust funds of a full-blood adult Creek Indian by approving a gift thereof to third persons, when the Indian owner is so mentally incompetent that he is wholly incapable of managing his affairs, of understanding the nature or extent of his property, or of intelligently disposing of the same.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Regulations of the Department of the Interior are set forth in an appendix to this brief, pp. 35–38, *infra*.

STATEMENT

The United States brought suit in the District Court on behalf of Jackson Barnett, a full-blood Creek Indian, to recover from the petitioner United States bonds in the face value of $15,000, or their proceeds or value if they had been converted, and for an accounting. These bonds had formerly been

held in the United States Treasury under the control of the Secretary of the Interior as restricted funds of Jackson Barnett.

The original bill of complaint is not shown in the record. An amended bill of complaint was filed on September 13, 1928, together with various supporting exhibits. (R. 1–37.) The petitioner moved to dismiss the amended bill on the ground, among others, that it did not state a cause of action against the petitioner. (R. 38–47.)[1] While this motion was pending (R. 47) the United States applied for leave to file a second amended bill of complaint. (R. 48–50.) The petitioner objected to the filing of the same on the ground, among others, that it did not show any cause of action against the petitioner. (R. 58–59.) The District Court, treating the objections to filing the second amended bill as a motion to dismiss, held that it failed to state a cause for equitable relief and thereupon denied the application of the United States to file the second amended bill and dismissed the suit. (R. 60–64.) Upon appeal the Circuit Court of Appeals reversed the judgment of the District Court, with directions to reinstate the suit and permit the United States to file

[1] The amended bill of complaint charged a *fraudulent combination* between Anna Laura Barnett, the purported wife of Jackson Barnett, and her attorneys, Harold C. McGugin and Marshall L. Mott, and A. J. Ward, Creek National Attorney, to procure the release of Jackson Barnett's restricted bonds and funds in the custody of the Secretary of the Interior, and to procure the delivery thereof, or of a portion thereof, to Anna Laura Barnett. (R. 1–22.)

its second amended complaint. (R. 76.) Its decree to this effect, filed February 3, 1930, is here for review. (R. 76.)

The second amended bill of complaint alleges the following facts:

That Jackson Barnett is an enrolled, full-blood member of the Creek Tribe of Indians, one of the Five Civilized Tribes of Oklahoma; that as such member of said tribe there was duly allotted to him his proportionate share of the tribal lands, these lands being located in the State of Oklahoma; that Jackson Barnett is about seventy-eight years of age, and is without issue; that at all times therein mentioned he was, and now is, illiterate, mentally incompetent, and wholly incapable of managing his affairs, or of caring for his property and person, and unable to appreciate or understand the nature or extent of his property. (R. 50-51.)

That in 1912 a guardian of the person and estate of Jackson Barnett was appointed by the County Court of Okmulgee County, Oklahoma, in which county Barnett then resided; that this guardian, or his successor, was thereafter duly recognized as such by the courts of Oklahoma and of the United States, the Department of the Interior, and by all the persons mentioned in the second amended bill of complaint, until November 30, 1926, when the Supreme Court of Oklahoma held his appointment to be invalid. (R. 51.)[1]

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[1] See *Barnett v. Barnett*, 121 Okla. 142; 122 Okla. 160; 122 Okla. 169.

That in 1912 an oil and gas lease of the land allotted to Jackson Barnett was executed by Barnett and his guardian and approved by the said County Court and the Department of the Interior, from which lease royalties accrued and were transmitted to the Secretary of the Interior as the property of Barnett; that by February 1, 1923, such royalties had accumulated in the amount of $1,156,750, which royalties had been invested in United States bonds by the Secretary of the Interior, and deposited in the Treasury of the United States. (R. 51–52.)

That on or about February 1, 1923, Albert B. Fall, then Secretary of the Interior, having shortly prior thereto requested of and received from the Treasury of the United States $1,100,000 par value of these bonds, caused $550,000 par value thereof to be delivered to the Equitable Trust Company, of New York, as trustee, upon trust to pay from the income thereof $20,000 annually to Jackson Barnett so long as he should live, and the remainder of the income thereof during the life of Jackson Barnett and all of the income thereof thereafter to certain uses of the American Baptist Home Mission Society of New York; that at the same time and as part of the same transaction, Albert B. Fall caused to be delivered to one Anna Laura Barnett, the purported wife of Jackson Barnett, the remaining $550,000 par value of these bonds, under an agreement whereby Anna Laura Barnett should cause $200,000 par value of these bonds to be placed in trust with the Riggs National Bank, of Wash-

ington, D. C., to pay from the income thereof $7,500 annually to Jackson Barnett so long as he should live and to pay the remainder of the income during the life of Jackson Barnett to Anna Laura Barnett, and upon the death of Jackson Barnett to pay all of the income and, from time to time thereafter, portions of the principal thereof to Anna Laura Barnett or to her daughter, Maxine Sturgis, until the entire trust fund should be paid to Anna Laura Barnett or her daughter; that the remainder of the bonds so received by Anna Laura Barnett were to become her sole and unrestricted property; that the agreement upon which the $200,000 par value of the bonds were delivered to Anna Laura Barnett was duly performed by her. (R. 52–53.)

That the annual interest on the bonds delivered to the Equitable Trust Company and to Anna Laura Barnett was in excess of $50,000. (R. 53.)

That at no time was Jackson Barnett able to read or write any language, or to comprehend readily the English language, or to understand elementary arithmetic; that by reason of his mental infirmity he was unable to appreciate or understand the nature or extent of his property, and at no time has he understood, or been able to understand, the terms and conditions on which the delivery of the bonds was made by the Secretary of the Interior. (R. 53–54.)

That the delivery of the bonds by the Secretary of the Interior was based upon a purported request

in writing bearing the thumb-print signature of Jackson Barnett, the nature, purpose, and effect of which he was and at all times has been wholly unable to comprehend and understand; that the said writing was drafted by one A. J. Ward, then Creek National Attorney, which writing, together with letters from Ward and the Commissioner of Indian Affairs, containing recommendations that Albert B. Fall authorize the deliveries of the bonds in accordance with the thumb-print instrument of request, were transmitted to Albert B. Fall; that these letters contained the statement that Jackson Barnett had been adjudged an incompetent by the County Court of Okmulgee County, Oklahoma, and that a guardian had been appointed of the person and the estate of Jackson Barnett, and was then acting as such. (R. 54.)

That the deliveries of said bonds and the execution of the purported thumb-print request were without notice to the guardian of Jackson Barnett, or to the County Court of Okmulgee County, Oklahoma; that the distribution and delivery of the bonds were not and at no time have been for the benefit of Jackson Barnett; that neither the Secretary of the Interior, nor any other officer of the Government, was at any time authorized by law to dispose of said bonds for the purposes above described, and that the acts of Albert B. Fall in disposing of the same were without warrant and authority of law. (R. 54-55.)

That Anna Laura Barnett, upon receiving $550,000 par value of said bonds as alleged, immediately delivered $150,000 par value thereof to one Harold C. McGugin, who thereupon delivered $15,000 par value thereof to the petitioner, Marshall L. Mott; that McGugin and Mott prior to the receipt by them of the bonds had actual knowledge of all the facts, circumstances, and matters recited in the complaint, and knew that the bonds were the property of Jackson Barnett and that Jackson Barnett was a mental incompetent, without mental capacity to make and initiate the said purported disposition of his bonds; that there was no consideration passing from Mott, or any person, to Barnett for delivery of the bonds. (R. 55-56.)

The complaint then alleges that Mott has refused to account to the United States for the bonds received by him, and prays that he be required to surrender the same to the Secretary of the Interior for the use of Jackson Barnett, subject to the restrictions thereon imposed by law, and if Mott has converted said bonds, that judgment be had for the value thereof. (R. 56-57.)

SUMMARY OF ARGUMENT

The purpose and policy of Congress in its legislation respecting the allotted property of the Five Civilized Tribes was to safeguard the individual ownership of the allottees, to prevent their exploitation, and to protect them from their own improvidence. The approval by the Secretary of the Interior of the attempted gift of a large part of

Jackson Barnett's restricted property to his purported wife and step-daughter, followed by the immediate delivery of a large part thereof to the wife's attorneys, strangers to Barnett, violated this long-established policy. Such disposal of his property was not for his "benefit" within the meaning of the Act of May 27, 1908, pp. 35–36, *infra*, the only source of such control as the Secretary of the Interior possessed over the restricted property. Accordingly, the approval by the Secretary of the purported thumb-marked request of Barnett for the gift of his property was without authority of law and invalid.

Moreover, at the time of the alleged gift Barnett was mentally deficient to the extent that he did not understand the nature and extent of his property or the nature or purpose of the alleged gift. Because of such mental incompetency (as distinguished from any incompetency arising out of his Indian status) Barnett could not make a valid gift of the bonds, and there was nothing upon which the approval of the Secretary of the Interior could operate. Accordingly, the title of Barnett to the bonds was not affected by the delivery thereof to his wife and to the Equitable Trust Company.

The petitioner received the bonds which are the subject of this suit with full knowledge of all the facts alleged in the second-amended complaint and of Barnett's mental incompetency. Therefore he acquired no right or title thereto.

ARGUMENT

I

THE DISTRIBUTION OF A LARGE PORTION OF JACKSON BARNETT'S BONDS TO HIS ALLEGED WIFE, FOLLOWED IMMEDIATELY BY THE DELIVERY OF PART THEREOF TO THE PETITIONER, WAS NOT FOR BARNETT'S BENEFIT WITHIN THE MEANING OF THE ACT OF MAY 27, 1908. SUCH DISTRIBUTION WAS THEREFORE INVALID AND DID NOT TRANSFER BARNETT'S RIGHT OR TITLE TO THE BONDS

Section 1 of the Act of May 27, 1908, p. 35, *infra*, provides:

> * * * all allotted lands of enrolled full-bloods, * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance * * * except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds *for the benefit of the respective Indians* as he may prescribe. (Italics ours.)

Although this Act only applies in terms to the "allotted lands" of full-bloods, it has been held, and it is conceded by the petitioner (Pet. Br. 14–15), that the income derived from restricted lands is impressed with the same trust in the hands of the Secretary of the Interior as the lands themselves. *United States* v. *Brown*, 8 F. (2d) 564, 567 (C. C. A. 8th), certiorari denied, 270 U. S. 644; *United States* v. *Hinkle*, 261 Fed. 518 (C. C. A. 8th). See also *Parker* v. *Richard*, 250 U. S. 235; *Sunderland* v. *United States*, 266 U. S. 226.

The original regulations issued under this Act (pp. 36–38, *infra*) provided that royalties accruing from any lease made on behalf of *incompetent* Indians should be held by the officer designated by the Secretary of the Interior or paid to the guardian or curator of the incompetent under order of the court having jurisdiction of the incompetent's estate. On October 7, 1922, these regulations were amended to provide that the Secretary might direct that such royalties be paid to the incompetents themselves "or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said 'cases'" (p. 38, *infra*).

The United States contends that under the statute the Secretary of the Interior is empowered to remove restrictions upon the allotted property of full-blood Creek Indians only when the disposal of the proceeds of such restricted property is *for the benefit of the particular Indian;* that the transaction by virtue of which the petitioner acquired that portion of Jackson Barnett's bonds which are the subject of this suit was not one for Barnett's benefit within the meaning of the statute, and that, therefore, the distribution of Barnett's bonds to his alleged wife (and thereafter to the petitioner), even though made with the approval of the Secretary of the Interior, was void.

By the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Creek Indians to whom allotments were made became United States citizens. Whereas formerly

the legal title to the lands was in the tribe for the common use of the members, by virtue of the Act of March 3, 1893, the absolute fee-simple title to the allotted lands passed under the allotment deeds to the individual Indians, subject only to the statutory restrictions against alienation. See *Choate* v. *Trapp*, 224 U. S. 665; *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 473; *Schrimpscher* v. *Stockton*, 183 U. S. 290. The rights of property thus acquired are within the constitutional guarantees of protection to the same extent as those of other citizens. *Choate* v. *Trapp*, *supra*.

The genesis of Section 1 of the Act of May 27, 1908, is found in Section 7 of the original Creek Agreement, approved March 1, 1901, c. 676, 31 Stat. 861, 863, which provided that the allotted lands "shall not be alienable by the allottee * * * except with the approval of the Secretary of the Interior." Almost the same language was used with respect to the restriction upon alienation in the Supplemental Creek Agreement, approved June 30, 1902, c. 1323, 32 Stat. 500, 503. Section 19 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, provided that the allotted lands should be inalienable for a period of 25 years "unless such restriction shall prior to the expiration of said period, be removed by Act of Congress."

From the foregoing it is clear that the Act of May 27, 1908, *supra*, which restored to the Secretary of the Interior the power to remove the restrictions on the alienation of allotted lands, is

but illustrative of other Acts which Congress has enacted in the exercise of its guardianship of its Indian wards. The general policy and purpose of such legislation has frequently been enunciated by this Court.

In *Heckman* v. *United States*, 224 U. S. 413, this Court, speaking with reference to the Act of March 3, 1893, *supra*, which provided for the allotment of lands to the individual members of the Five Civilized Tribes, said (pp. 432–433):

> But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligation, not simply by assuring an equitable apportionment of the property, but by safeguarding *the individual ownership of allottees* through suitable restrictions which were designed to secure them in their possession and to prevent their exploitation. (Italics ours.)

The Court also said (pp. 436–437):

> The placing of restriction upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning.

* * * * * *

> During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians can not be gainsaid. * * * Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed.

In *Sunderland* v. *United States*, 266 U. S. 226, a case involving the Act now under consideration, this Court, speaking with reference to the power of Congress to impose restrictions upon alienation, said (pp. 233–234):

> Such power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence.

Unquestionably the purpose of Section 1 of the Act of 1908 was the protection of the individual Indian allottees in the use and enjoyment of their property, and the preservation of that property against their own improvidence, and the exploitation of others. In view of the declared purpose and policy of the statute, it seems clear that Congress did not contemplate outright gifts or gratuities by an Indian allottee of a substantial portion of his restricted property to members of his fam-

ily as a "disposal of the proceeds" of such property for his "benefit" within the meaning of the Act of 1908.

In the instant case a large portion, approximately $550,000, of Jackson Barnett's property was delivered outright to his alleged wife. It was intended, of course, as alleged in the complaint (R. 53), that approximately $350,000 of this amount should immediately become her absolute property, and this is demonstrated by the fact that she promptly transferred $150,000 to her attorneys, as compensation for their services in bringing about the delivery of the bonds to her by the Secretary of the Interior. On the face of it, this transaction was not one for the benefit of Barnett but one for the benefit of Barnett's alleged wife and her lawyers, including the petitioner. The alleged wife and her attorneys sought to give the purported gift an appearance of respectability by providing that $200,000 of the bonds received by her should be put in a trust, from which part of the income should be paid to Barnett during his life. This fact, however, can not prevent the transaction from being primarily and in the larger part for the benefit of persons other than Barnett. We submit that under the statute the disposal of the proceeds of restricted property must be for the benefit of the Indian in the sense that it contributes to his personal support, comfort, and enjoyment. It is not sufficient that the money be

distributed to some one who may possibly use it in some way beneficial to the Indian.

The contention of the United States is well expressed by the following statement in the opinion of the court below (R. 74):

> The statute is an assurance of protection against spoliation. The Secretary's duty and power are not complied with by simply removing restrictions on alienation to a large part, probably here the far greater part, of the ward's estate; as part thereof it is further required of him that he agree to the terms of sale and the disposal of the proceeds. He is given no authority to turn over the property or its proceeds to the Indian, nor consent that others might take to themselves the whole or a large part of it. Nor do we know of any authority in him to surrender the trust in which these bonds were held by the Government and consent to their deposit with others as trustees on terms that took from Barnett all property right in the principal and denied to him their full interest yield. * * *

The petitioner contends that the action taken by Secretary Fall in approving the purported request of Barnett for the gift to his alleged wife was in conformity with a well-settled construction by the Department of the Interior of the Act of May 27, 1908, and in support of this contention quotes short excerpts from various legal opinions of the Solicitor of the Department of the Interior.

Without endeavoring to point out the inapplicability of most of these quotations to the instant case, it is enough to say that the petitioner presents no case other than the present one where the Secretary of the Interior has held that he has the power to remove restrictions from allotted property so as to permit an Indian to make an absolute gift of a large part of his restricted funds to a member of his family.

The petitioner contends that the determination of whether the gift to Barnett's alleged wife was for Barnett's benefit was a matter within the exclusive discretion of the Secretary and argues that the honest exercise of discretion by an executive officer authorized to act in the premises can not be reviewed by the courts upon any issue of fact committed to his discretion. The United States does not question the correctness of the principle upon which this contention is based, but denies its applicability.

Under the Act of 1908, it is conceded that the Secretary possesses power to remove restrictions from allotted property where such action is for the benefit of the Indian, but his discretionary power does not permit him to determine that something is a benefit which, as a matter of law, could not be a benefit within the meaning of the statute. If the question whether Barnett was benefited within the meaning of the statute by the distribution of

his bonds had been fairly debatable, then the Secretary could have removed the restrictions. But the delivery of Barnett's bonds to his wife as an outright gift, we submit, as matter of law was not for his benefit and the approval of the gift was therefore wholly beyond the authority conferred upon the Secretary by the statute.

It is well established that a decision by the Secretary of the Interior on a question of law is not conclusive upon the courts and is subject to judicial review and correction. *Work* v. *Louisiana*, 269 U. S. 250, 254; *Santa Fe Pacific R. R. Co.* v. *Fall*, 259 U. S. 197, 199; *Lane* v. *Hoglund*, 244 U. S. 174; *Garfield* v. *Goldsby*, 211 U. S. 249; *Decatur* v. *Paulding*, 14 Pet. 497; *Hemmer* v. *United States*, 204 Fed. 898, 905 (C. C. A. 8th.).

Lane v. *Hoglund, supra*, was a proceeding for a writ of mandamus to compel the Secretary of the Interior to issue a patent to public land to an entryman who contended he had met all the statutory requirements therefor. In denying the contention that the Secretary's decision whether the requirements of the statute had been complied with was conclusive, this Court, quoting from an earlier case, said (p. 182):

> Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead

> that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

A similar view of the Secretary's power was set forth by this Court in *Garfield* v. *Goldsby, supra*, 211 U. S. 249, 262:

> In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the Acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

We submit that the contention of the petitioner that the act of Secretary Fall in approving the distribution of Barnett's bonds is not subject to review by the courts is untenable.

II

THE PURPORTED GIFT OF BARNETT'S BONDS TO HIS ALLEGED WIFE WAS INVALID BECAUSE OF HIS LACK OF MENTAL CAPACITY TO MAKE A GIFT. THE APPROVAL OF THE TRANSACTION BY THE SECRETARY OF THE INTERIOR DID NOT MAKE THE GIFT VALID

Although the court below based its decision upon the ground that the distribution of $550,000 par value of Barnett's bonds to his alleged wife was not for Barnett's "benefit" within the meaning of the Act of May 27, 1908, and that therefore approval of the alleged gift by the Secretary of the Interior did not operate to remove the statutory restrictions on the bonds, the United States contends that the attempted gift was invalid for the further reason that Barnett was mentally incapable of making a gift of the property, and that the approval of the transaction by the Secretary did not make the gift valid.

It is elementary that a clear intent of the donor to divest himself forever of his property is indispensable to a valid gift *inter vivos*. *Snavely* v. *Henderson*, 204 Fed. 978 (C. C. A. 8th). It is equally elementary that for a valid gift *inter vivos* the donor must possess sufficient mental capacity to be able to understand the nature and effect of the transaction. *Gibson* v. *Collins*, 4 F. (2d) 874, 878 (Ct. App. D. C.), certiorari denied, 267 U. S. 605; *Sawyer* v. *White*, 122 Fed. 223 (C. C. A. 8th); *Polt* v. *Polt*, 205 Pa. 139, 141; *Conners* v. *Murphy*, 100 N. J. Eq. 280, 282. Under these and similar authorities, it is clear that if the alleged gift to Bar-

nett's alleged wife required the assent thereto of Barnett for its validity it failed altogether.

Jackson Barnett could not and did not give away his bonds, if, indeed, it may be said the bonds, as such, were his. The allegations of the complaint show that he was and is unable to read or write any language, unable to readily understand the English language, and that he was, and is, incapable mentally of appreciating the nature or value of his property, the terms of the transaction by which the bonds were distributed, or the objects and purposes for which the bonds were given away. (R. 51, 53–54.) These allegations do not merely show "mental weakness" on the part of Barnett, as suggested in the petitioner's brief; they establish clearly that at the time of the purported gift there was entirely lacking the mental capacity on the part of Barnett to act. Under these circumstances, even if there had been no restrictions against the alienation of his property, the transaction would be open to rescission by him, or by his representative.

The petitioner contends that the mental status of Barnett is unimportant, and that even if he did not know what he was doing when he made the gift, the subsequent approval by the Secretary of the Interior supplied the requisite intent of the donor otherwise required and validated the entire transaction. The necessary effect of this contention is that under the statute the Secretary of the Interior possesses power to make, in his discretion, outright gifts of restricted property wholly with-

out regard to the intention, wishes, or consent of the Indian owner.

The United States contends that under Section 1 of the Act of 1908 the Secretary of the Interior has not been given the power to *initiate* or *make* alienations to third persons of restricted property. His power is only one of *ratification* or *approval*.

Section 1 of the 1908 Act (p. 35, *infra*) provides that the allotted lands "shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance * * * except that the Secretary of the Interior may remove such restrictions * * *." The power thus given to the Secretary is not to alienate, or sell, or encumber, but *to remove the restrictions* upon an alienation, sale, or encumbrance. His power in this respect is not different, we submit, than it was under the original Creek Agreement (See p. 12, *supra*), which provided that the allotted lands should "not be alienable *by the allottee* * * * except with the *approval* of the Secretary of the Interior." (Italics ours.)

Section 2 of the Act of 1908 (pp. 35–36, *infra*.) provides that all allotted lands other than homesteads "may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years * * *: *Provided*, That leases of restricted lands for oil gas or other mining purposes, * * * and leases of restricted lands for periods of more than five years,

may be made, with the approval of the Secretary of the Interior, * * * and not otherwise." In Section 2 of the Act the power of the Secretary with respect to *leases* of allotted property is expressly designated as a power of *approval*. This section expressly refers to leases by a guardian or curator where the Indian is incompetent. If the consent of the allottee, or of a guardian or curator where the Indian is incompetent, is necessary for a short-term lease *a fortiorari* such consent would seem to be necessary for *an absolute gift* of his restricted property.

It has frequently been held under Section 2 of the Act of 1908 and similar statutes with respect to the making of leases of restricted property that the Secretary possesses only the power of approval or disapproval, that he has no authority to initiate or make a lease, and that his approval of a lease made without consent of the allottee does not validate the lease. *Holmes* v. *United States*, 33 F. (2d) 688 (C. C. A. 8th); *Jennings* v. *Wood*, 192 Fed. 507 (C. C. A. 8th); *Midland Oil Co.* v. *Turner*, 179 Fed. 74 (C. C. A. 8th); *Hampton* v. *Ewert*, 22 F. (2d) 81 (C. C. A. 8th), certiorari denied, 276 U. S. 623; *Crosbie* v. *Brewer*, 68 Okla. 16, 26-27. See also *United States* v. *Brown*, 15 F. (2d) 565 (N. D. Okla.).

Jennings v. *Wood*, *supra*, involved the Act of July 1, 1902, providing that leases of the allotted lands of Cherokee citizens "for a period longer than five years * * * may also be made with

the approval of the Secretary of the Interior and not otherwise." This language is very similar to that used in Section 2 of the Act of 1908. The case cited was a suit to cancel a lease made by a Cherokee minor without participation by the guardian of her estate or under an order of the probate court. The court held that the lease was invalid and that the approval of the Secretary did not make it valid. In its opinion the court said (p. 508):

> The jurisdiction of the Secretary of the Interior is only that expressed in the acts of Congress. He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases. If an Indian did not desire to lease there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto.

The views above expressed seem to be supported by the decision of this Court in *Sunderland* v.

United States, 266 U. S. 226, where the following statement was made with respect to the power of the Secretary under Section 1 of the Act of 1908 (p. 235):

> Since the allotted lands could not be sold or encumbered *without his consent*, and since the proceeds of any sale thereof were subject to his control and could only be disposed of *with his approval* and under such rules as he might prescribe for the benefit of the respective Indians, the extension of such control to the property in which the proceeds were directly invested would seem to be within the statute fairly construed. Indeed, we think the authority of the Secretary to *withhold his consent* to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control. * * * (Italics ours.)

This Court thus refers to the "consent" of the Secretary to a sale or encumbrance of the allotted property and to his "approval" of the disposal of the proceeds. If, as the United States contends, the power of the Secretary under Section 1 is only to consent to or approve alienations of restricted property, then the purported gift to Barnett's alleged wife in the instant case was wholly void because of Barnett's lack of mental capacity to make a gift.

Moreover, even assuming that in a proper case the Secretary of the Interior could initiate a gift or alienation of restricted property for the benefit of the Indian without regard to the wishes of the Indian, or of the guardian of an incompetent Indian, such is not the situation in the instant case. The disposition of Barnett's bonds did not grow out of an original undertaking by the Secretary to make a disposal thereof for Barnett's benefit. The complaint alleges that the "delivery of said bonds by the Secretary of the Interior was made and based upon a purported request in writing, bearing the thumbprint signature of the said Jackson Barnett." (R. 54.) The sole action of the Secretary was the approval of an alleged gift made by Barnett. Since the gift was wholly invalid because of Barnett's incapacity to understand what he was doing, the Secretary's approval was a nullity.

Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325 (S. D. N. Y.), which involved the same transaction as in the instant case, was a suit (in which the United States intervened) by the person appointed as Jackson Barnett's guardian by the County Court of Okmulgee County, Oklahoma, as *prochein ami* for Barnett, to recover the $550,000 par value of bonds delivered by the Secretary of the Interior to the Equitable Trust Company. (See pp. 5–6, *supra*.) In that case the court held that the alleged gift of the bonds was void because of Barnett's lack of understanding; that the attempted

gift was not and could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds thereof to the Secretary of the Interior as the property of Barnett. Judge Knox in his opinion said with reference to Secretary Fall's approval of the alleged gift (p. 326):

> But such approval, however honest and disinterested it may have been, can not give validity to a gift or donation which the apparent donor did not make, and which, by reason of mental incompetency, he was incapable of making. * * *

The petitioner argues that if it were necessary for Barnett to be able to comprehend what he was doing when the alleged gift of his bonds was made, then there is no need of any statutes giving the Secretary of the Interior general supervision over alienations of allotted property. But the Congress and this Court have always recognized a duty to protect Indians, as such, against their own improvidence, whether mentally competent or incompetent.

It is contended by the petitioner that since the transaction in question took place in the District of Columbia, its validity is to be determined by the laws of that place. But a mental incompetent who has no capacity to understand what he is doing or to determine intelligently whether he wants to do it, even if he is not insane, can not make a valid deed or contract in that jurisdiction. See *Gibson*

v. *Collins*, 4 F. (2d) 874, 878 (Ct. App. D. C.); certiorari denied, 267 U. S. 605.

The petitioner contends that the Secretary of the Interior, in approving the delivery of the bonds, must be regarded as having passed upon the question of Barnett's mental competency, and that his determination in that respect can not be questioned in the courts. Substantially the same contention was made and effectively answered in *Jennings* v. *Wood*, 192 Fed. 507 (C. C. A. 8th), *supra*. In denying the contention that the approval by the Secretary of a lease executed by a minor was a conclusive determination that the lessor was of age, the court said (p. 508):

> *It was no more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally*, or that he belonged to the class or his land was of the character covered by the statute, if in fact those conditions were wanting. The instrument went to the Secretary of the Interior as a lease competently executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did his decision would not be conclusive. (Italics ours.)

See also *United States* v. *Brown*, 15 F. (2d) 565 (N. D. Okla.).

The petitioner further argues that the United States has always recognized as valid the oil and gas lease on Barnett's allotment from which the royalties were derived which were used in purchasing the bonds here involved; that if Barnett, with the approval of the Secretary of the Interior, could make a valid lease he could initiate a valid gift of his property. The lease in question was executed in 1912. It was thumb-marked by Barnett, and signed, with the approval of the County Court of Okmulgee County, Oklahoma, by Carl J. O'Hornett, who had been appointed by that court as guardian for Barnett, and who at the time was acting in that capacity, and who, with his successor, Bailey, continued to act in that capacity for fourteen years thereafter. (R. 51.) It is true that in 1926 the Supreme Court of Oklahoma held the guardian's appointment invalid (see p. 4, *supra*), but in all the intervening time Barnett's guardian had been recognized and treated as such by the courts of Oklahoma and of the United States, by the Department of the Interior, by Barnett's alleged wife and the petitioner, and by all other parties mentioned in the complaint. (R. 51.) The lease was obviously intended to be made in strict conformance with Section 2 of the Act of May 27, 1908, providing for the execution of such leases "by guardian * * * under order

of the proper probate court" where the Indian was "incompetent," and under the circumstances—the lease having been largely executed—it is doubtful if any court would hold that the lease was invalid.

Moreover, the making of the lease was an action obviously for the personal and pecuniary *benefit of Barnett*. By the lease his property was not lessened but augmented. Clearly the making of the lease resembles in no way the transaction now before the Court.

As pointed out above, the contention of the petitioner that the delivery of the bonds to Barnett's alleged wife was a valid gift because it was approved by the Secretary of the Interior, even though Barnett did not know what he was doing at the time, amounts to a contention that the Secretary possesses a discretionary power to make outright gifts of restricted property without regard to the intention or consent of the Indian owner. It is submitted that such an extraordinary power should not be held to reside in the Secretary of the Interior unless the statute clearly requires such a construction; and, further, that there are grave doubts whether the statute, if so construed, would be constitutional.

The courts have frequently described the restricted property of Indian allottees in the control of the Secretary of the Interior as a "trust fund." It is elementary that a trustee can not give away

the property of his *cestui* merely because the trustee is convinced that the donation is for the best interests of his beneficiary. The Secretary of the Interior has frequently been called the "guardian" of the restricted property and the Indians have been referred to as "wards." But a guardian is held to the strictest accountability for the estate of his ward and can not make donations and gratuities from the same. *Moore* v. *Smith*, 182 Fed. 540 (C. C. A. 9th), certiorari denied, 219 U. S. 587; *In re LeBourgeois*, 144 La. 501. Nor can the curator or the committee of the estate of an insane person *personally* dispose of the insane person's property by donations. It is true that in relatively rare cases a *court* may permit allowances from the estate of the insane person for other than strictly legal obligations in situations where allowances are necessary for the *support* of relatives or needy persons, or even make allowances to charities, when it specifically appears that the insane person himself would have provided for such support or allowances had he been sane. *Matter of Flagler*, 248 N. Y. 415. But no court ever held that the committee of the estate of an insane person could make an absolute gift of a large portion of the estate to a member of the insane person's family under circumstances at all comparable to the gift to Barnett's alleged wife in the instant case. And some courts deny altogether the power

of a court of equity to order a gratuity to be paid from the estate of an insane person to his relatives or to a needy person who has been the recipient of the insane person's bounty when he was of sound mind. *Binney* v. *R. I. Hospital Trust Company*, 43 R. I. 222, 243.

Moreover, as previously pointed out, full-blood Creek Indians to whom allotments have been made are United States citizens, and their property and rights as such are within the protection of the Constitution. Even Congress may not impair these rights. In *Choate* v. *Trapp*, 224 U. S. 665, a case involving the same statute now under consideration, this Court said with respect to the rights of the Indian in his restricted property (p. 677):

> His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States * * *. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.

It is submitted that Congress by the Act of 1908 did not intend to, and under the Constitution could not, vest in the Secretary of the Interior the arbitrary power to make outright gifts of restricted Indian property without the concurrence of the Indian owner.

III

SINCE THE PETITIONER RECEIVED THE BONDS WITH NOTICE OF THE FACTS ALLEGED IN THE COMPLAINT AND THE MENTAL INCOMPETENCY OF BARNETT HE ACQUIRED NO TITLE OR RIGHT THERETO

The second amended bill of complaint alleges that the petitioner and McGugin had actual knowledge of all the matters recited therein, that the petitioner received the bonds which are the subject of this suit from McGugin with full knowledge that they were restricted property of Jackson Barnett, that they were procured from royalties accruing from Barnett's restricted land, and that Barnett was mentally incompetent and without the mental capacity to make or initiate the alleged gift of the bonds in question to his wife. (R. 55–56.)

It is not necessary to cite authorities to sustain the contention of the United States that the petitioner stands in no better position than that of Barnett's alleged wife, or of McGugin, from whom he received the bonds. In *Barnett* v. *Equitable Trust Company, supra,* Judge Knox said with respect to this point (p. 332):

> As the instrument under which Barnett's funds were removed from the custody of the Secretary of the Interior was and is invalid, the defendants, both of which were put on notice of the Indian's incompetency, and the gifts having been without consideration,

can take no property or beneficial interest therein, and must be found to hold the same, together with the interest thereon, for the benefit of the rightful owner of the property.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Act of May 27, 1908, c. 199, 35 Stat. 312, 313, so far as here pertinent provides:

> SEC. 1. * * * That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restriction on alienation or incumbrance, be as follows: * * * all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *
>
> SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the al-

lottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, * * *

* * * * * *

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

By the Act of May 10, 1928, c. 517, 45 Stat. 495, the period of restrictions upon alienation provided by Section 1 of the Act of May 27, 1908, was extended for a period of twenty-five years from April 26, 1931.

Section 24 of the Regulations prescribed by the Secretary of the Interior under the Act of May 27, 1908, approved March 3, 1921, provided:

24. All royalties, rents, or payments due under leases which have been or may be approved by the Secretary of the Interior, shall be paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, or to such other person as may be designated by the Secretary of the Interior, for the benefit of the various lessors, or, in cases of minors and incompetents, shall be deposited as hereinafter specified. No royalties on such leases shall be paid by the lessee direct to the lessors or their representatives.

* * * * *

All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the Superintendent for the Five Civilized Tribes, or such other officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the Judge of the County (Probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the Department), or upon authority of such court in the form of an order satisfactory to said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes.

Provided, however, that the said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes, is authorized in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any

lease have been paid to said Superintendent, to withhold the disbursement of such royalties, rents, or payments, wholly or in part from any such adult, or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.

On October 7, 1922, Section 24 of the Regulations of March 3, 1921, was amended by the addition thereto of the following paragraph:

> And provided further, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.

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